Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

October Term, 1995

ROBERT G. MENKEN and
ERASMO JOSE INOCENCIO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether a defendant may be criminally prosecuted for the conduct that was relied upon by the government to forfeit the defendant's property in an uncontested administrative proceeding.

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OFFICIAL AND UNOFFICIAL REPORTS

The decision of the United States Court of Appeals for the Ninth Circuit was a memorandum decision, not for publication, filed on September 27, 1995.

The district court decision was filed on January 4, 1995. Both are reproduced in the appendix. (Appendix 1-7).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on September 27, 1995.

There have been no motions for extensions of time to file this petition for a writ of certiorari.

This Court has jurisdiction to review the question presented herein by writ of certiorari pursuant to 28 U.S.C. § 1254.

STATEMENT OF PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

STATEMENT OF THE CASE

(With the basis of jurisdiction of the Court in the first instance.)

This petition seeks review of the United States Court of Appeals for the Ninth Circuit's opinion affirming the trial court's final order denying these Petitioners' motions to dismiss the indictment. Those motions sought dismissal on the ground that the previous forfeiture of the Defendants' property constituted "punishment" so as to preclude subsequent criminal prosecution for the same underlying alleged conduct.

The district court had jurisdiction pursuant to the double jeopardy clause of the Fifth Amendment to the United States Constitution and such cases as *United States v. Dixon*, 113 S.Ct. 2849 (1993); *United States v. Nimitz*, 424 U.S. 600 (1976) and *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).

The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which authorizes review of final orders. *See, e.g., Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *United States v. Szado*, 912 F.2d 390 (9th Cir. 1990).

Petitioners were indicted on February 9, 1994, for a conspiracy to distribute and possess with intent to distribute marijuana. The indictment alleges that the conspiracy existed from December of 1992, until January 14, 1994. Defendant Inocencio was also indicted for possession with intent to distribute marijuana, use of a firearm (18 U.S.C. § 924(c)) and receiving the proceeds of a felony (21 U.S.C. § 853(a)(1) and (2)).

The charges against Inocencio and Menken arose from an investigation in January of 1994. As a result of that investigation, both Menken and Inocencio were arrested by federal law enforcement officials.

A.

On January 15, 1994, special agents of the DEA arrested Robert Menken in connection with the above-referenced charges. Mr. Menken was arrested at a Comfort Inn Motel in Farmington Hills, Michigan. After Mr. Menken's arrest, the government obtained a search warrant authorizing the search of Mr. Menken's residence. The government conducted a search of Mr. Menken's residence later that same day. During the search, government agents discovered a semi-automatic pistol. There was no evidence that the pistol had been possessed by Mr. Menken during his alleged involvement in the charges in the instant case, or during his arrest. Nonetheless, the DEA agents seized the pistol during the search of Mr. Menken's residence.

On February 22, 1994, the government sent a "Notice of Seizure" to Mr. Menken. That "Notice of Seizure" sought forfeiture of the pistol pursuant to 21 U.S.C. § 881, alleging that the pistol "was used or acquired as a result of a drug related offense." Mr. Menken never responded to the Notice of Seizure. On April 8, 1994, the government issued a "Declaration of Forfeiture" forfeiting the pistol to the United States. (See Appendix at 8-9).

B.

On January 14, 1994, DEA agents arrested Defendant Erasmo Jose Inocencio and conducted a search of the residence in which he was located at 4519 S. Chatham Ridge. During that search, DEA agents seized some Nineteen Thousand, Three Hundred Forty-Six Dollars and Twenty-Five Cents ($19,346.25) in currency and a cellular phone valued at Eleven Hundred Dollars ($1,100.00). Thereafter, the DEA agents conducted a search of a residence at 1715 S. Carthage Pl., a residence owned by the Defendant and his wife. The DEA agents seized Twenty-Nine Thousand Nine Hundred Dollars ($29,900.00) in United States currency at this residence. Thereafter, the government filed notices of seizure of the $19,346.25 seized from Chatham Ridge, the cellular phone seized from Chatham Ridge and the $29,900.00 in U.S. currency seized from Carthage Pl. All three notices of seizure were filed pursuant to 21 U.S.C. § 881, alleging that the items were subject to forfeiture because "they were used or acquired as a result of a drug related offense."

Defendant Inocencio did not contest any of the above-referenced forfeitures. On April 8, 1994, the government issued declarations of forfeiture, forfeiting the $29,900.00 and the $19,346.25 to the government. (Appendix at 12-15). Thereafter, on May 6, 1994, the government issued a third declaration of forfeiture, forfeiting the cellular phone to the government. (Appendix at 10-11).

C.

Subsequent to the declarations of forfeiture being issued, Defendants Inocencio and Menken filed motions

seeking dismissal of the above-described criminal charges. In connection with those motions, the Defendants either filed affidavits, or made avowal to the court, that they owned the forfeited property.[1] The Defendants argued that they had been "punished", as that term is used in the double jeopardy clause of the Fifth Amendment. Pursuant to such decisions as *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and *United States v. 405,089.23 United States Currency*, 33 F.3d 1210 (9th Cir. 1994) (hereinafter "$405,089.23"), the Defendants argued that because they had already been subjected to "jeopardy" and punished, the criminal charges against them must be dismissed.

On January 4, 1995, the district court issued its order denying the Defendants' claim. (Appendix at 3-7). The district court ruled that there was no evidence that the Defendants were in fact the owners of the forfeited property. Additionally, the court ruled that the forfeitures had not occurred as part of a "proceeding", and that jeopardy did not attach pursuant to such decisions as *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994).

Both Defendants immediately sought a stay from the district court, which was granted pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). On September 27, 1995, by memorandum decision, the United States Court of Appeals affirmed the decision of the district court, relying upon its then recent decision

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[1] The government never questioned the Defendants' ownership of the forfeited property.

in *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995). (Appendix at 1-2).

REASONS FOR GRANTING THE WRIT

A. This Court needs to ultimately decide whether uncontested civil forfeitures constitute "jeopardy" to avoid a wide split of authority.

In recent years, both federal and state authorities have dramatically increased the use of "quasi-criminal" proceedings, such as civil forfeitures and taxes, to "regulate" criminal activity. This Court has frequently been called upon to evaluate the impact of such "quasi-criminal" proceedings under the double jeopardy clause of the Fifth Amendment to the United States Constitution. *See, e.g., Department of Revenue v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937, ___ L.Ed.2d ___ (1994); *Austin v. United States*, ___ U.S. ___, 113, S.Ct. 2801, 125 L.Ed.2d 488 (1993); *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). Confronting the reality of the expanding use of such "quasi-criminal" proceedings for punitive purposes, this Court has recognized that such "quasi-criminal" proceedings are, indeed, cognizable under the double jeopardy clause.

Recently, in *$405,089.23*, the United States Court of Appeals for the Ninth Circuit, following the logic of such decisions as *Austin* and *Halper*, squarely held that civil forfeiture proceedings do indeed constitute "punishment" for double jeopardy analysis. As a result, and following the clear logic of the *Austin*, *Halper*, and *Kurth Ranch*, it has been recognized that the government may

not criminally prosecute an individual and forfeit his property for the same criminal conduct in separate actions.

Both the district court and court of appeals have distinguished the facts of this case from those presented in *$405,089.23* solely on the basis that the Defendants herein did not elect to contest the civil administrative forfeitures. Relying upon the decision in *United States v. Cretacci, supra,* and the earlier decision of the Seventh Circuit in *United States v. Torres, supra,* the Ninth Circuit in this case ruled that the Defendants' failure to contest the forfeiture proceedings waives their right to assert the protections of the double jeopardy clause in a subsequent criminal prosecution. *See also, United States v. Baird,* ___ F.3d ___, No. 95-1202 (May 18, 1995).

The decisions in *Cretacci* and *Torres* are by no means consistent with recent decisions from other courts. In *United States v. Aguilar,* 886 F.Supp. 740 (E.D. Wash. 1994), for instance, the court squarely held that uncontested civil forfeiture proceedings do invoke the protections of the double jeopardy clause:

> "It is irrelevant whether, as the government claims, Aguilar failed to contest forfeiture. (Analogously, incarceration is still punishment, even if it is sentenced pursuant to a plea agreement rather than a contested trial.)"

United States v. Aguilar, supra, at 743.

The *Aguilar* court's decision squarely rested upon the logic of this Court's decision in *Austin* and the decision of the Ninth Circuit in *$405,089.32. See, e.g., United States v.*

Aguilar, supra, at 743 Fn. 3. *See also, United States v. Baird, supra,* (Sarokin, J., dissenting).

A third line of analysis is exemplified by *United States v. Ursery,* 59 F.3d 568 (6th Cir. 1995). In *Ursery,* the court held that a civil forfeiture proceeding *resolved by a consent decree* would preclude further criminal prosecution under the double jeopardy clause:

> "The fact that there has been no trial in which a jury is sworn or the court hears evidence does not preclude jeopardy from attaching to a plea entered pursuant to a plea agreement. Similarly, the fact that there has been no trial in a civil forfeiture proceeding does not preclude the attachment of jeopardy to a forfeiture judgment."

United States v. Ursery, supra, at 572.

Rather remarkably, the *Ursery* court claimed that its decision was consistent with that of the Seventh Circuit in *Torres.*

There are, undoubtedly, *thousands* of administrative forfeiture proceedings initiated each year in the United States. It is apparent that there is currently a widespread difference as to whether uncontested forfeiture proceedings invoke the protections of the double jeopardy clause. Numerous judges have found that uncontested forfeiture proceedings should invoke the protections of the double jeopardy clause:

> "The issue should be whether the defendant was the owner, not whether he filed a proper and

> timely claim of ownership in the forfeiture proceeding."

United States v. Baird, supra, (Sarokin, J., dissenting).

In the face of the burgeoning practice of civil administrative forfeiture proceedings, and in the absence of a clear decision by this Court, there will continue to be conflicting decisions concerning whether or not uncontested civil forfeiture proceedings invoke the protections of the double jeopardy clause. This Court should grant review herein to authoritatively answer that question.

B. A decision by this Court is necessary to avert a flood of litigation.

For a variety of reasons, it is apparent that only a decision by this Court can avert a flood of litigation associated with such decisions as *Cretacci* and *Torres*. As discussed above, there is no unanimity of opinion concerning the correctness of the *Torres* and *Cretacci* decisions. In the absence of a timely decision by this Court, district and appellate courts throughout the United States will be called upon over and over again to review double jeopardy claims as a result of uncontested civil administrative forfeitures.

A second and even greater flood will follow. The clear thrust of the decisions in *Torres* and *Cretacci* is to require defendants to contest civil administrative forfeiture proceedings, if only to perfect a later claim of double jeopardy. As Judge Sarokin noted in his dissent in *Baird*:

> "A rule which would require property owners to file a claim and go through the motions of

> contesting a civil forfeiture merely to preserve a double jeopardy issue has little to recommend it. Tens of thousands of uncontested forfeitures would soon find their way into court."

United States v. Baird, supra, (Sarokin, J., dissenting), (quoting 1. David B. Smith, *Prosecution and Defense of Forfeiture Cases,* 12.10, at 12-141 N. 33.1.)[2]

Regardless of this Court's eventual resolution of the issue, it is apparent that only a timely decision by this Court can stem the tide of litigation on this issue.

C. The legal fiction underlying such decisions as *Cretacci* and *Torres* is an unsuitable foundation to support double jeopardy principles of wide application.

This Court has many times held that the double jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and *"multiple punishment for the same offense." United States v. Halper, supra* 490 U.S. at 440 (citing *Pearce v. North Carolina,* 390 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). "The third of these protections . . . has deep roots in our history and jurisprudence." *Halper, supra,* 490 U.S. at 440. It has been recognized that the constitutional ban against multiple punishments safeguards "humane interests" and that the protection it affords "is intrinsically

---

[2] If this Court ultimately rules as the *Torres* and *Cretacci* courts did, the government may alter its forfeiture strategy to avoid this flood. But it is obvious that no such change in strategy will occur without an authoritative ruling from this Court.

personal." *Id.* at 447 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544, 63 S.Ct. 379 (1943)) (Frankfurter, J. concurring).

To overcome the obvious conclusion that defendants who have already had their property forfeited have been "punished" for jeopardy purposes, the courts in both *Cretacci* and *Torres* found it necessary to erect what are, obviously, transparent legal fictions. In *Cretacci*, the court held that where the government sends notice of seizure and a defendant fails to claim the property, the defendant has "effectively abandoned it." *United States v. Cretacci*, *supra* at 310. In *Torres*, the court held that where a defendant fails to make a claim, he is "a non-party" and that:

> "[a]s a non-party, Torres was not at risk in the forfeiture proceeding," and "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy."

United States v. Torres, *supra*, at 1465.

The notion that a defendant whose property is taken in an uncontested forfeiture proceeding is "without risk" is obviously a legal fiction. As recognized by this Court in *Austin*, the "legislative history of § 881 confirms the punitive nature of these [forfeiture] provisions." Clearly, the "punishment" inflicted on the property holder, loss of the property, is identical regardless of whether or not the property holder asserts a claim.

The legal fiction constructed in *Cretacci* to the effect that a defendant who fails to assert a claim to seize property "abandons it" is even more problematic. A defendant who asserts an ownership interest in seized

property, especially in the face of a pending or potential criminal prosecution, necessarily does so only by relinquishing his constitutional protection against self-incrimination. The decision not to assert a claim can hardly be equated with a voluntary decision to relinquish property and hence an abandonment. An individual who is faced with both the seizure of his property and a criminal prosecution should not have to forego one constitutional right (self-incrimination) to exercise another (double jeopardy).

To avoid this obvious constitutional dilemma, the *Cretacci* court, with the stroke of a pen, asserted that a defendant's assertion of an ownership interest, in a forfeiture proceeding, could not be used against him, pursuant to *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). *United States v. Cretacci, supra*, at 310. The *Cretacci* court "announced" this immunity protection for all claims filed in the context of civil forfeiture proceedings without citing any authority, whatsoever.[3] Acceptance of this rationale from *Cretacci* raises the potential for havoc in our legal system as defendants assert claims to property and then argue various permutations of immunity claims.

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[3] Previous Ninth Circuit decisions have held, or at least strongly suggested, that the fact that an individual made a claim to property in a forfeiture case *is* admissible against the accused. *See, e.g., Baker v. United States*, 722 F.2d 517 (9th Cir. 1983); *United States v. Fifteen Thousand Five Hundred Dollars ($15,500.00) in U.S. Currency*, 558 F.2d 1359 (9th Cir. 1977).

CONCLUSION

For all of the foregoing reasons, this Court should issue its order granting this petition for a writ of certiorari and scheduling a review of the decisions below.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERASMO JOSE INOCENCIO; ROGERT [sic] G. MENKEN, Defendants-Appellants.	No. 95-10021 D.C. No. CR-94-00054-01-WDB MEMORANDUM* (Filed Sep. 27, 1995)

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted September 18, 1995**

Before: BROWNING, GOODWIN and O'SCANNLAIN, Circuit Judges.

Erasmo Jose Inocencio and Robert G. Menken appeal the district court's denial of their motions to dismiss a criminal indictment on double jeopardy grounds. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Inocencio and Menken contend that the criminal charges should be dismissed because they have already been subjected to punishment for the same offenses through the government's uncontested administrative forfeiture proceedings. This contention is foreclosed by *United States v. Cretacci*, No. 94-10235, slip op. 9565, 9571 (9th Cir. Aug. 4, 1995), in which we held that an administrative forfeiture of unclaimed property does not constitute punishment for purposes of the Double Jeopardy Clause.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. ERASMO JOSE INOCENCIO, ROBERT G. MENKEN, Defendants.	CR 94-054-TUC WDB ORDER (Filed Jan. 4, 1995)

Defendants Inocencio and Menken both claim immunity from criminal prosecution herein (for marijuana and firearms charges involving conspiracy and possession, as well as a criminal forfeiture count involving currency) based on violation of the double jeopardy provisions of the Fifth Amendment to the United States Constitution.

After his arrest, Menken's house was searched and two handguns were seized. After notice to Menken, no claim was made by anyone, the guns were administratively forfeited. There was no judicial proceeding.

After Inocencio's arrest, at 4519 Chatham, Tucson, Arizona, that house was searched and currency ($19,346.25) and a cellular phone were seized. Approximately ten days later, his house at 1715 S. Carthage Place, Tucson, Arizona, was searched and currency ($29,000.00) was seized. After notice to Inocencio, no claim to this property was made, the property was administratively forfeited. There was no judicial proceeding.

In both instances, the seizure was made pursuant to 21 U.S.C. § 881, "because it was used or acquired as a result of a drug related offense". Notice was also published.

Any person, not only Defendants here, could claim the property and show that the owner innocently let it into the possession of the defendant(s). (See Seizure Notice, p. 3.)

In April, 1994, during the pendency of this action, a civil forfeiture case was filed against the Carthage Place property. That case (CV94-216) was assigned to the undersigned consistent with the policy of this District to assign related cases to the same judge. Defendant and his wife both filed answers in that case with affidavits of ownership denying that the property was acquired or maintained with the fruits of illegal activity.

Pursuant to stipulation, an order was entered staying all proceedings in the civil forfeiture case until the conclusion of the criminal case. Again, by stipulation, the Inocencios remain in possession of the property.

Both defendants urge that the recent case of *U.S. v. $405,089.23 U.S. Currency,* 33 F.3rd 1210 (9th Cir. 1994) controls. However, that case differs from this in several particulars, most importantly:

1. There were two parallel *judicial* proceedings over the same conduct.

2. The claimants filed a claim to the property.

In the case at bar, neither defendant made any claim, after notice, to the seized personalty. Because ownership was not determined the property was declared forfeit.

Several scenarios exist which would have prevented administrative forfeiture and compelled a *judicial* civil forfeiture proceeding in which a judgment adverse or favorable to Inocencio or Menken would constitute jeopardy. First, they could have claimed innocent ownership and had the subsequent civil action stayed pending the criminal trial. The Government could have elected to add a forfeiture count to the criminal case (a practice approved in *ARLT*). Others could have claimed innocent ownership of the property and been awarded all or part of it. Yet nothing was done to justify this court, or the government, in believing these defendants owned or had any interest in the specific personalty.

None of the cases dealing with this issue has addressed the posture of this case, that is parallel proceedings, one of which is non-judicial, where the moving party was not a party to both proceedings. The matter was, however, squarely dealt with in *U.S. v. Torres*, 28 F.3d 1463 (7th Cir. 1994), where Torres was caught passing over $60,000.00 to undercover agents. The U.S. started an administrative proceeding – as here – as well as a criminal proceeding. The Court there noted that the prohibitions of the double jeopardy clause are activated by separate trials. Jeopardy attaches, *Torres* says, "when evidence is produced *at a trial*". Either an acquittal or forfeiture in that proceeding is a bar to a subsequent – or parallel pending proceeding – trial.

Here, as in *Torres*, we don't know if the defendants owned all or part of the property, were even possessors or custodians, or were totally void of any legally recognizable property interest. Until there is a contested proceeding placing at issue the validity of the defendants'

claimed interest in the *res* there is simply no jeopardy which attaches.

Defendants' claim that the requirement of asserting a property interest in the *res* would violate the protection afforded them by the Fifth Amendment privilege against self-incrimination. However, the protection to the Fifth Amendment is not such that it creates a claim of ownership. Otherwise no forfeiture could ever occur, even where a suspected claimant (record title holder or otherwise) was erroneously given notice. The reach of the Fifth Amendment's protection falls short of creating a constitutionally mandated claim of ownership. Indeed in all the reported cases there was an affirmative claim of ownership. Though prosecutorial and defendants' decisions were all made prior to *ARLT,* it is not inconceivable that claims made in the administrative proceeding would have resulted in the government dropping the matter, suspending proceedings until the criminal proceedings were resolved, or deciding to seek a superseding indictment including *criminal* forfeiture counts and dismiss the administrative or ensuing civil proceedings. This court cannot speculate as to what action the government *might* take and thus cannot determine whether jeopardy would attach.

While the above disposes of defendants' claims with regard to the personalty involved there remains the claims of Defendant Inocencio and his wife to realty (1715 S. Carthage Place). That proceeding is a civil action pending before the undersigned (CV94-216 TUC-WDB). Upon the claim of ownership by Mr. and Mrs. Inocencio all further proceedings, including discovery, were stayed. No jeopardy has attached nor will it attach until a trial is

convened and evidence introduced. Thus, the Rule announced in *ARLT* is inapplicable here. Furthermore, though not necessary here (except for illustration), it is worthy of note that the Inocencios made a timely claim to the *res* of this civil proceeding, but none as to the *res* in the administratively handled forfeiture.

To the extent the filing of this motion in the criminal case might be deemed as making a claim to the personalty the Court notes that it is made late, after any proceeding creating jeopardy is precluded.

The Motion to Dismiss on Behalf of Both Defendants is DENIED.

DATED this 4 day of January, 1995.

/s/ William D. Browning
WILLIAM D. BROWNING
UNITED STATES
DISTRICT JUDGE

U.S. Department of Justice
Drug Enforcement Administration

[SEAL]

SEIZURE #: 148809 CASE #: 17940063
PROP: DAVIS INDUSTRIES MODEL P380
SEMI-ID#:
VALUE: $600.00
SEIZURE DATE: 15 JAN 94
SEIZURE PLACE: FARMINGTON HILLS, MI
OWNER: SAME AS ABOVE
SEIZED FROM: MENKEN, ROBERT
JUDICIAL DIST: MICHIGAN EASTERN

DATE: APRIL 8, 1994

DECLARATION OF FORFEITURE

The above-described property has been seized by agents of the **DRUG ENFORCEMENT ADMINISTRATION** pursuant to 21 U.S.C. 881. Notice of the seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. **THEREFORE,** it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/s/ Illegible
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: DETROIT, MI
DEA/RO: _____
USMS: DETROIT, MI

DEA.294 (MAR. 92) BY: AMM AD CODE #: 233

U.S. Department of Justice
Drug Enforcement Administration

[SEAL]

SEIZURE #: 150189 CASE #: MQ940034
PROP: NEC CELLULAR TELEPHONE
ID#:
VALUE: $1100.00
SEIZURE DATE: 14 JAN 94
SEIZURE PLACE: TUCSON, AZ
OWNER: INOCENCIO, ERASMO JOE
SEIZED FROM: INOCENCIO, ERASMO JOE
JUDICIAL DIST: ARIZONA

DATE: MAY 6, 1994

DECLARATION OF FORFEITURE

The above-described property has been seized by agents of the **DRUG ENFORCEMENT ADMINISTRATION** pursuant to 21 U.S.C. 881. Notice of the seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. **THEREFORE**, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/s/ Illegible
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: PHOENIX, AZ.
DEA/RO: TUCSON, AZ.
USMS: PHOENIX, AZ.

DEA.294 (MAR. 92) BY: HLH AD CODE #: 236 4

U.S. Department of Justice
Drug Enforcement Administration

[SEAL]

SEIZURE #: 149010 CASE #: MQ940034
PROP: $19,346.25 U.S. CURRENCY
ID#:
VALUE: $19,346.25
SEIZURE DATE: 14 JAN 94
SEIZURE PLACE: TUCSON, AZ
OWNER: INOCENCIO, ERASMO JOE
SEIZED FROM: INOCENCIO, ERASMO JOE
JUDICIAL DIST: ARIZONA

DATE: APRIL 8, 1994

DECLARATION OF FORFEITURE

The above-described property has been seized by agents of the **DRUG ENFORCEMENT ADMINISTRATION** pursuant to 21 U.S.C. 881. Notice of the seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. **THEREFORE,** it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/s/ Illegible
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: PHOENIX, AZ.
DEA/RO: TUCSON, AZ.
USMS: PHOENIX, AZ.

DEA.294 (MAR. 92) BY: AEB AD CODE #: 233

U.S. Department of Justice
Drug Enforcement Administration

[SEAL]

SEIZURE #: 149011 CASE #: MQ940034
PROP: $29,900.00 U.S. CURRENCY
ID#:
VALUE: $29900.00
SEIZURE DATE: 26 JAN 94
SEIZURE PLACE: TUCSON, AZ
OWNER: INOCENCIO, ERASMO JOE
SEIZED FROM: INOCENCIO, ERASMO JOE
JUDICIAL DIST: ARIZONA

DATE: APRIL 8, 1994

DECLARATION OF FORFEITURE

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/s/ Illegible
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: PHOENIX, AZ.
DEA/RO: TUCSON, AZ.
USMS: PHOENIX, AZ.

DEA.294 (MAR. 92) BY: AEB AD CODE #: 233

Supreme Court, U.S.
FILED
APR 15 1996
CLERK

No. 95-1036

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT G. MENKEN AND ERASMO JOSE INOCENCIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioners' prosecution for drug trafficking and firearms offenses after the uncontested administrative forfeiture of handguns, currency, and a cellular telephone seized from petitioners.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the judgment is noted at 67 F.3d 309 (Table). The opinion of the district court (Pet. App. 3-7) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1995. The petition for a writ of certiorari was filed on December 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 9, 1994, a grand jury in the District of Arizona returned an indictment charging petitioners with conspiring to possess and distribute marijuana, in violation of 21 U.S.C. 846. The indictment also charged petitioner Inocencio with possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and using and carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Before trial, petitioners moved to dismiss the indictment on the ground that the prosecution was barred by the Double Jeopardy Clause. The district court denied the motion, and petitioners took an interlocutory appeal. The court of appeals affirmed. Pet. App. 1-2.

1. On January 14, 1994, agents of the Drug Enforcement Administration (DEA) arrested petitioner Inocencio in Tucson, Arizona. The agents searched the house where Inocencio was arrested and seized $19,346.25 in cash and a cellular telephone, along with approximately 1,786 pounds of marijuana. On January 26, 1994, agents executed a search warrant at a second house owned by Inocencio, where they seized an additional $29,000 in cash. Pet. App. 3; Gov't C.A. Br. 3-4.

On January 15, 1994, DEA agents arrested petitioner Menken at a Michigan motel. The agents then obtained a warrant to search Menken's residence, where they seized two handguns. Pet. App. 3; Gov't C.A. Br. 4.

2. The DEA subsequently initiated administrative forfeitures of the seized property. The DEA sent petitioners notices which stated that the property had been seized pursuant to 21 U.S.C. 881 and that it was

believed to be subject to forfeiture because it "was used or acquired as a result of a drug related offense." Pet. App. 4; Gov't C.A. Br. 4. The notices also explained the procedures for filing a claim to the seized property or a petition for remission of the forfeiture. *Ibid.*

Neither petitioner contested the forfeiture or filed a claim to the property or a petition for remission of the forfeiture. Pet. App. 3; Gov't C.A. Br. 4. On April 8, 1994, the DEA administratively forfeited to the United States the currency seized from petitioner Inocencio's residence and from the house where he was arrested, as well as the handguns seized from petitioner Menken's residence. Pet. App. 8-9, 12-15. On May 6, 1994, the DEA administratively forfeited the cellular telephone seized from the house where Inocencio was arrested. *Id.* at 10-11.

3. After their indictment, petitioners moved to dismiss the charges. Petitioners claimed that the forfeiture of their property had punished them for the acts charged in the indictment, and that their conviction and sentencing for those crimes would therefore violate the Double Jeopardy Clause's prohibition on multiple punishments for the same offense. The district court denied the motion, holding that petitioners had not been placed in jeopardy by the administrative forfeiture proceeding. Pet. App. 3-7. Observing that "neither defendant made any claim, after notice, to the seized [property]," *id.* at 4, the court concluded that "[u]ntil there is a contested proceeding placing at issue the validity of the defendants' claimed interest in the *res* there is simply no jeopardy which attaches," *id.* at 5-6.

4. Petitioners filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1-2. The

court held that petitioners' double jeopardy claim was "foreclosed" by its holding in *United States* v. *Cretacci*, 62 F.3d 307 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996), that "an administrative forfeiture of unclaimed property does not constitute punishment for purposes of the Double Jeopardy Clause." Pet. App. 2.

ARGUMENT

Petitioners contend (Pet. 6-12) that the Double Jeopardy Clause bars their prosecution because they have previously been punished by the administrative forfeiture of property seized from them. The court of appeals correctly rejected that contention, and it does not warrant further review.[1]

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 441-442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801

[1] The merits of petitioners' double jeopardy claim are not properly before this Court because the court of appeals lacked jurisdiction to consider it. As we explained in our opposition to the petition for certiorari filed in *Baird* v. *United States*, cert. denied, 116 S. Ct. 909 (1996) (No. 95-630), a multiple punishments claim, such as petitioners raise, is not subject to interlocutory appeal, because "that aspect of the [double jeopardy] right can be fully vindicated on an appeal following final judgment." *Abney* v. *United States*, 431 U.S. 651, 660 (1977). We have supplied petitioners with a copy of our brief in *Baird*.

(1993), the Court held that the civil forfeiture provisions at issue in that case are sufficiently punitive to be subject to review under the Excessive Fines Clause of the Eighth Amendment. The courts of appeals are currently divided with respect to the application of the Double Jeopardy Clause to successive criminal punishment and civil forfeiture based on the same underlying conduct, and this Court recently granted the government's petitions for certiorari in two cases that raise aspects of this issue. See *United States* v. *$405,089.23*, 33 F.3d 1210 (1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued April 17, 1996); *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued April 17, 1996).

Every court of appeals that has considered the issue has held, however, that a person who does not contest the forfeiture of property cannot claim to have suffered punishment as a result of that forfeiture. See *United States* v. *German*, 76 F.3d 315, 317-320 (10th Cir. 1996); *United States* v. *Idowu*, 74 F.3d 387, 392-396 (2d Cir. 1996); *United States* v. *Sykes*, 73 F.3d 772, 773-774 (8th Cir. 1996); *United States* v. *Baird*, 63 F.3d 1213, 1217-1219 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Cretacci*, 62 F.3d 307, 310-311 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).[2] Those

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[2] There is no basis for petitioners' assertion (Pet. 8) that "[n]umerous judges have found that uncontested forfeiture proceedings should invoke the protections of the double

courts have recognized that administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.[3] Thus, when the government gives notice that it intends to obtain the forfeiture of property, and the recipient of that notice fails to take appropriate

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jeopardy clause." Petitioners cite only two cases in support of that claim: the district court decision in *United States* v. *Aguilar*, 886 F. Supp. 740 (E.D. Wash. 1994), and the dissenting opinion of Judge Sarokin in *United States* v. *Baird*, *supra*. Neither of those decisions creates a circuit conflict; to the contrary, both the Third and Ninth Circuits have squarely held that criminal prosecution following an administrative forfeiture does not violate the Double Jeopardy Clause. See *United States* v. *Baird*, *supra*; *United States* v. *Cretacci*, *supra*.

[3] Under 21 U.S.C. 881(d), the provisions of the customs laws governing summary forfeiture may be used against property that is subject to forfeiture under the controlled substances laws. See also 21 C.F.R. 1316.74-1316.77. The applicable customs statutes, 19 U.S.C. 1602-1621, provide for the administrative forfeiture of specified categories of seized property if the government publishes notice of seizure and intention to forfeit the property. If no claim is filed, the agency has the authority to declare the property forfeited without a judicial determination. See 19 U.S.C. 1609; 21 C.F.R. 1316.77. If a proper claim and bond (or proof of indigence) is filed, the agency seeking forfeiture must transmit the matter to the appropriate United States Attorney's Office to commence a judicial forfeiture action. See 19 U.S.C. 1608. To commence that action, the government files an in rem complaint against the property and publishes notice of the forfeiture proceeding. Any person who wishes to contest the judicial forfeiture must file a claim and an answer to the complaint. See Fed. Supp. R. Civ. P. C (Supplemental Rules for Certain Admiralty and Maritime Claims). In judicial forfeiture proceedings, a claimant may challenge the government's right to obtain fc feiture and may raise an innocent owner defense.

steps to preserve his interest in the property, the government may consider the property abandoned or ownerless, at least by that person. As the Ninth Circuit has explained, "[j]ust as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights, the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *United States* v. *Cretacci*, 62 F.3d at 310-311 (citations omitted). See also *United States* v. *Baird*, 63 F.3d at 1218 ("Because Baird never asserted an interest in the money that was seized from his residence, he cannot now claim to have been punished by its forfeiture."); *United States* v. *Arreola-Ramos*, 60 F.3d at 192 (because only unclaimed property may be administratively forfeited, administrative forfeiture "punishes no one"); *United States* v. *Torres*, 28 F.3d at 1466 (administrative forfeiture does not impose punishment on person who fails to establish an interest in the forfeited property). Petitioners did not file a timely claim when the government initiated the administrative forfeitures of the property seized from them, and their double jeopardy claim is therefore without merit.

Moreover, a person who fails to file a claim in response to a notice that the government will seek administrative forfeiture of property never becomes a party to any forfeiture proceeding. Even assuming that an individual may be placed "in jeopardy" other than in a criminal case, a person who has not participated in a proceeding cannot be said to have been placed "in jeopardy" within the meaning of the Double Jeopardy Clause. See *United States* v. *German*, 76 F.3d at 320 (jeopardy does not attach in administrative forfeiture proceeding); *United States*

v. *Pena*, 67 F.3d 153, 155-156 (8th Cir. 1995) (defendant not placed in jeopardy by administrative forfeiture proceeding); *United States* v. *Arreola-Ramos*, 60 F.3d at 192 ("Absent a trial, a party, and a punishment, jeopardy can never attach."); *United States* v. *Baird*, 63 F.3d at 1218 ("jeopardy does not, and cannot, attach until one is made a *party* to a proceeding"); *United States* v. *Torres*, 28 F.3d at 1465 ("As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach.'") (quoting *Serfass* v. *United States*, 420 U.S. 377, 391-392 (1975)). Petitioners' failure to file a claim therefore precludes a finding that they were in jeopardy or suffered punishment in the administrative forfeiture pro-ceedings.[4]

2. There is no reason to hold this case pending the disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346. In *$405,089.23*, the Ninth Circuit held that the civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment under the Double Jeopardy Clause. In *Ursery*, the Sixth Circuit held that the civil judicial forfeiture of pro-

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[4] This Court has made clear that "the Double Jeopardy Clause * * * does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978). When a defendant makes a deliberate decision "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused," he cannot claim in a subsequent proceeding that he has been "twice put in jeopardy." *Id.* at 98-99; see *Ricketts* v. *Adamson*, 483 U.S. 1, 10-12 (1987). By declining to file a claim to the seized property, petitioners avoided becoming parties to the forfeiture actions. They therefore cannot claim that the subsequent criminal proceedings violated their rights under the Double Jeopardy Clause.

perty used to facilitate a drug crime under 21 U.S.C. 881(a)(7) always amounts to punishment for double jeopardy purposes. The government's brief in those consolidated cases argues that civil forfeiture followed by criminal prosecution does not raise double jeopardy concerns, that the forfeitures at issue do not constitute punishment, that civil forfeiture and the criminal offense on which it rests are never the "same offense" under the Double Jeopardy Clause, and that parallel civil forfeiture and criminal actions constitute a single proceeding for purposes of the multiple punishments prong of the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in *Ursery* and *$405,089.23* would provide additional grounds on which to reject petitioners' claims, a decision favorable to the respondents in those cases would not provide petitioners with a basis for relief. The Ninth Circuit, which has taken the most expansive view of the application of the Double Jeopardy Clause to civil forfeiture proceedings, rejected petitioners' claim in this case. See also *United States* v. *Cretacci, supra*; *United States* v. *Washington*, 69 F.3d 401 (9th Cir. 1995). Accordingly, a decision adverse to the government in *Ursery* and *$405,089.23* would have no effect on the validity of the court of appeals' reasoning in the instant case.[5]

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[5] We note that this Court recently denied three petitions for a writ of certiorari that presented the question whether a criminal conviction following an administrative or other uncontested forfeiture violated the Double Jeopardy Clause. See *Baird* v. *United States*, 116 S. Ct. 909 (1996); *Penny* v. *United States*, 116 S. Ct. 931 (1996); *Nakamoto* v. *United States*, No. 95-7313 (April 1, 1996); see also *Smith* v. *United*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

NINA GOODMAN
Attorney

APRIL 1996

States, cert. denied, No. 95-6830 (Apr. 1, 1996) (uncontested judicial forfeiture following criminal conviction).